United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1210

To be Argued By
NANCY ROSNER

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- -

UNITED STATES OF AMERICA

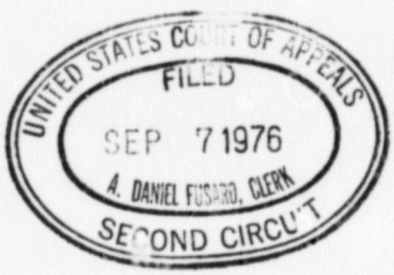
-v-

WILLIAM TURNER,

Appellant

- -

On Appeal from the United States District
Court for the Southern District of New York.



BRIEF FOR APPELLANT
WILLIAM TURNER

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UNITED STATES OF AMERICA

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76-1210

WILLIAM TURNER,

Appellant

- -

BRIEF FOR APPELLANT WILLIAM TURNER

STATEMENT OF THE CASE

William Turner appeals from a judgment of conviction entered May 21, 1976 in the United States District Court for the Southern District of New York and from the denial of appellant's pro se motion for acquittal on grounds of selective prosecution.

1) District of Columbia Indictments:

On October 26, 1972 a grand jury in the District of Columbia returned Indictment No. 1971-72 charging twelve defendants with conspiracy to violate various narcotics laws.

On January 31, 1973 a superseding indictment, No. 99-73, was returned naming the original defendants and adding appellant William Turner.

On motion by the government the District Court (Gesell, J.) dismissed the first indictment on February 26, 1973. On March 29, 1973 the government orally moved to dismiss the second indictment due to the unavailability of a key witness and the discovery by the government of the unreliability of another important witness. The motion was granted by Judge Gesell.

2) Florida Indictment:

On December 27, 1973 the government procured a third indictment in the Southern District of Florida. Indicted were seven of the defendants previously named in the D.C. Circuit indictments, including appellent Turner, and three others. The allegations were substantially the same as in the D.C. indictments. Chief Judge Fulton, in view of his finding that the government was "court shopping", transferred the case to the District of Columbia, along with the defendant's motion to dismiss for want of a speedy trial.

These motions were granted on May 16, 1974 by District Judge Gesell, holding that his dismissal of

the second D.C. indictment had been with prejudice as to the reinstitution of the case in the District of Columbia.

3) Southern District of New York Indictments:

On July 28, 1975, Indictment No. 75 Cr. 747 was filed in the Southern District of New York charging appellant Turner and fifteen others with twelve counts of conspiracy and substantive violations of federal narcotics laws. On October 6, 1975 an order of nolle prosequi was entered as to this indictment due to the procurement of superseding indictment No. 75 Ct.788, filed August 5, 1975.

The facts and circumstances which led to the filing of 75 Cr. 747 were among the facts and circumstances which led to the filing of 75 Cr. 788. Appellant Turner was a defendant in both indictments.

On November 18, 1975 the instant indictment, No. 75 Cr. 1112, was filed and superseded 75 Cr. 788. This indictment charged Turner and sixteen others with conspiracy and substantive violations of federal narcotics laws during the same period as both superseded indictments, 1969 to 1973. Turner was charged with conspiracy (Count 1) and one substantive offense (Count 10). He was tried jointly with eleven other defendants before a jury and the Honorable Kevin T. Duffy.

Appellant was found guilty of the conspiracy count and acquitted of the substantive offense. On May 21, 1976 he was sentenced to fifteen years in prison.

Allegedly, the central figure of the operation was Warren Robinson, who operated a large scale narcotics business out of a men's shop on Georgia Avenue in Washington, D.C. and an apartment in New York City leased to Ernestine Barber, another defendant. Robinson and a partner, Thomas ("Tennessee") Dawson, a major government witness, made many trips starting in the spring of 1971 to New York where they purchased narcotics from Paul DiGregorio, an intermediary for Frank Pugliese and later Harry Pannierello, for distribution to customers in the Washington area, including defendants Wesley, Taylor and Ramsey.

Some time in the summer of 1970, Dawson testified he saw Mr. Turner at Robinson's men's shop (A-15)* as did another government witness, James March, who worked for Robinson at the time (A-49). There was no evidence of any activity relating to narcotics on these occasions. Dawson also testified that he and Robinson drove to Turner's house in Silver Springs, Maryland in the late summer of 1971. Robinson told Dawson that he was going there because Turner

*References to the appendix bear the prefix "A".

was supposed to have narcotics. (A-16).

Pugliese and Pannierello, at this time, were also supplying narcotics to defendant Al Green at his apartment in the Bronx. Dawson, and occasionally Robinson, made many trips to New York to buy narcotics through DiGregorio.

During this time the defendant Wesley came to work for Dawson at his bar in Baltimore. Soon Robinson and Dawson agreed to sell Wesley narcotics. They were also selling narcotics at this time to defendant Cecil Tate and Robinson had the use of Tate's apartment for the narcotics business.

In June of 1971, defendant Salley entered the conspiracy - his apartment was used by Robinson and March to cut and store narcotics. And in the summer of 1971 defendant Walter John Smith, owner of a surgical supply store in D.C., started to supply lactose to Robinson and Dawson.

That fall Pugliese went to jail so he arranged for Pannierello and Pat Dilacio to take over his narcotics business while he was in jail. Thereafter, Dawson met with Pannierello to pick up narcotics at a restaurant in New Jersey. Pugliese left Pannierello and Dilacio two kilograms of heroin, some of which went to Al Green and some to defendant Basil Hansen, who took delivery at defendant Hattie Ware's apartment.

Later that fall, or early winter, defendant Wesley made a few trips to New Jersey to pick up the narcotics from Pannierello.

In early 1972 Pannierello found a new source for narcotics, Carmine Pugliese, and soon found a new deliveryman, Jimmy Provitera. That February, Dawson testified that Turner came to Robinson's apartment in Silver Springs to sample some narcotics. Turner said he might buy some (A-20), but Robinson later told Dawson that he didn't (A-21).

The next month, Dawson, March and Robinson were all in New York to buy narcotics from Pannierello. They cut and prepared the narcotics at Ernestine Barber's apartment, in order to deliver some in New York. Robinson told Dawson the delivery was to Turner, who was supposed to be in a New York hotel waiting for them. Robinson took the narcotics into the hotel while Dawson remained outside (A-22). While this occurred, March was at Barber's apartment. He had heard Robinson say some of the narcotics was for Turner (A-53). After Robinson and Dawson left, March testified that Turner phoned and March said Robinson was on the way. When Robinson returned, he claimed to have met Turner.*

Around this time, Dawson left Washington and began cooperating withthe government. After this March took over much of Dawson's role in the conspiracy. He began to make trips to New York regularly and the deliveries in and around

*The appellant was acquitted by the jury for the substantive offense predicated on this testimony.

Washington, D.C. continued. The conspiracy continued until the end of 1973, some time after Pannierello and Provitera were arrested and began cooperating with the government.

At the start of trial appellant Turner was represented by assigned counsel, but in the course of trial appellant felt counsel was inadequate to protect his interests. The court refused to grant a severance and continuance (A- 57), but did allow appellant to proceed pro se. At the conclusion of trial appellant Turner filed a motion for a judgment of acquittal or a new trial based on selective and discriminatory prosecution (A-73). The court denied that motion without a hearing. (A-88)

POINT I

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS THE INDEPENDENT NON-HEARSAY EVIDENCE SHOWS ONLY AN ISOLATED DISCUSSION OF A PURCHASE OF NARCOTICS WHICH WAS NEVER CONSUMMATED.

"The gist of the offense of conspiracy... is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy." United States v. Falcone, 311 U.S. 205 at 210 (1940). The essence of the crime of conspiracy is agreement. Thus, in order to prove that a defendant conspired to violate federal narcotics statutes the government must offer evidence of willing participation in the conspiracy.

Several cases have come before this Court wherein the government has attempted to satisy its burden of showing willing and knowing participation in a conspiracy by evidence of a single sale or purchase of narcotics. It is clear that if the purpose of a conspiracy is to distribute and possess narcotics, there will be purchasers of drugs from the conspirators who are not thereby made

conspirators themselves. See United States v. Peoni, 100 F.2d 401 (2d Cir. 1938), and United States v. Terrell, 474 F.2d 872,875 (2d Cir. 1973). Further, if a crime of necessity involves the cooperation of two persons, as in every sale or purchase of narcotics, the separate crime of conspiracy is not established by the agreement to purchase or sell narcotics. Iannelli v. United States, 420 U.S. 770,774 (1975); United States v. Zueli, 137 F.2d 845 (2d Cir. 1943). Thus the isolated fact of a purchase of narcotics from a conspirator does not permit an inference that the purchaser is a conspirator. A fortiori, an agreement to purchase which is never consummated does not permit an inference that the intended purchaser is a conspirator.

This principle does not mean that a single act can never be the basis for inferring participation in a conspiracy if, by the nature of the act, knowing participation is shown. Thus, if the isolated act were transporting narcotics into the country at the behest of a conspirator, participation in the conspiracy might easily be found. In United States v. Aviles, 274 F.2d 179 (2d Cir.), cert denied, 362 U.S. 974 (1960), this court said:

> "A single act may be the foundation for drawing the actor within the ambit of a conspiracy. See e.g., United States v. Carminatti, 2d Cir., 247 F.2d 640, certiorari denied, 1957, 355 U.S. 883,

> 78 S.Ct. 150, 2 L.Ed. 2d 113. But since conviction of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent".

274 F.2d at 189.

With respect to a single purchase or sale of narcotics or agreement to do so, however, this Court has repeatedly held that it is insufficient evidence upon which to find participation in a large, multi-party conspiracy. See United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974) and United States v. Tramunti, 513 F.2d 1087 (2d Cir. 1975). It is a principle based in logic and its continued vitality is particularly important in these times when the government frequently resorts to conspiracy prosecutions for acts which will not even support a substantive offense, as is the case here.

Recasting the independent non-hearsay evidence in the light most favorable to the government, the proof was that Turner visited Robinson's apartment in early 1972 when Dawson was present; that Turner was given a sample of narcotics by Robinson and Dawson; that Turner only said he might buy some; that Robinson later told Dawson that Turner decided not to buy (A- 20,21)*

*Turner was acquitted of the only substantive offense charged against him.

Compared to other cases where this Court reversed convictions on the basis of the one transaction rule, this case is egregious for its lack of proof.

In United States v. Koch, 113 F.2d 982 (2d Cir. 1940), the defendant Koch purchased 170 ounces of cocaine from the conspirator Mauro at $25. per ounce. He sold some of it and returned some portion of it to Mauro complianing about the quality. In holding that this evidence was insufficient to tie Koch into the conspiracy this Court said:

> "It has been strenuously argued that the utmost reach of the proof made him out to be only an isolated purchaser from the conspirators and not proved guilty of the crime charged in the indictment even though the purchase was unlawful. It is apparent that there is real difficulty in this respect. The amount of the cocaine purchased would, of course, indicate that it was taken not for personal consumption alone but for resale. But the appellant was not a steady purchaser from the conspirators and so it cannot be inferred as it was in United States v. De Vasto, 2d Cir., 52 F.2d 26, 78 A.L.R. 36, that he knew of the conspiracy and was acting to further its ends rather than exclusively his own.
>
> ...
>
> "The purchase of the cocaine from Mauro was not enough to prove a conspiracy in which Mauro and the appellant participated. They had no agreement to advance any joint interest. The appellant bought at a stated price and was under no obligation to Mauro except to pay him that price. The purchase alone was insufficient to prove the appellant a conspirator with Mauro and those who were his co-conspirators.

> Dickerson v. United States, 8 Cir., 18 F.2d 887. It was necessary to the government's case to show that the appellant was in some way knowingly associated in the unlawful common enterprise to import the drugs and dispose of them unlawfully United States v. Peoni, 2 Cir. 100 F.2d 401; Muyres v. United States, 9 Cir. 89 F.2d 784.

(113 F.2d at 983.)

Unlike this case where the agreement to purchase was never consummated, Koch might be construed as having participated in two transactions, a purchase and a resale to Mauro. Nevertheless, because, in the totality of the circumstances, the transaction provided no evidence that Koch knew of the conspiracy or wilfully participated in it, this Court reversed Koch's conviction.

In United States v. Reina, 242 F.2d 302 (2d Cir.), cert denied, 354 U.S. 913 (1957), the defendant Valachi sold heroin to a conspirator Shillitani who later sought him out to complain about the quality of the drugs accompanied by Lafitte. Hearing of the bad merchandise Valachi said:

> "I can do nothing. It is the way I get it, it is the way I give it. I give you my word I never touch it. The way I get it is the way I give it to you. Any further time I can make good for it, let us see".

(242 F.2d at 305).

This conversation is easily susceptible of the interpretation that Valachi had dealt with Shillitani

in the past and would be happy to do so in the future. Nothing comparable is present in this case. Nevertheless, this Court found it too shaky a foundation upon which to bottom an inference of continuous participation in a conspiracy.

In United States v. Stromberg, 268 F.2d 256 (2d Cir.), cert denied, 361 U.S. 863 (1959), Snyder, a customs agent, delivered a large quantity of heroin to two conspirators. In reversing his conviction this Court said:

> "We also think that the conviction of the appellant Snyder must be reversed. At the trial, it was stipulated that Snyder had been introduced to either Aron or Baruche in 1949, before the conspiracy began. Aside from this, which standing alone was insufficient to support a conviction, the only incident connecting Snyder with the conspiracy is the delivery of two suitcases, later found to contain heroin, to Vellucci and Ewing in Hoboken. In United States v. Reina, 2d Cir. 242 F.2d 302, certiorari denied sub nom. Moccio v. United States, 354 U.S. 913, 77 S.Ct. 1294, 1 L.Ed.2d 1427 we held that participation in a single isolated transaction was an insufficient basis upon which to bottom an inference of continuing participation in a conspiracy. For aught that appears in this record, this was Snyder's only transaction with the group; under the reasoning of the Reina case, the evidence is insufficient to support the inference that Snyder knew or accepted the conspiratorial aims or that his participation went beyond the single transaction".

(268 F.2d 267).

In United States v. Aviles, supra, the defendant Rodriguez purchased narcotics from a central conspirator Cantellops. In reversing his conviction this Court said:

> "Rodriguez was not a regular customer of Cantellops, so far as appears from the evidence. We may assume that Rodriguez knew that the narcotics were illegally imported, but there is insufficient basis in the evidence for assuming that he knew that Cantellops was an agent for an existing conspiracy. So far as appears, Rodriguez had no knowledge whatever as to how Cantllops came into possession of the drugs.
>
> The single purchase alone was not enough to prove that Rodriguez was a participant in the conspiracy. It was necessary to the government's case to submit evidence that Rodriguez knew of the conspiracy and associated himself with it. United States v. Reina, 2d Cir. 242 F.2d 302, certiorari denied, 1957, 354 U.S.913, 77 S.Ct. 1294, 1 L.Ed. 2d 1427; United States v. Koch, 2d Cir. 1940, 113 F.2d 982; United States v. Peoni, 2d Cir. 1938 100, F.2d 401.

(274 F.2d at 190).

In United States v. Ah Kee Eng, 241 F.2d 157 (2d Cir. 1957) Eng agreed to purchase five packets of heroin for $1000 from two Chinese sailors who came to his apartment one evening. The following day Eng arranged to meet them by telephone to consummate the purchase and was arrested as he approached the meeting place.

In Eng's case there was some evidence that he knew the heroin had been imported by these two sailors on their ship which might lead Eng to the conclusion that the two had conspired to import the heroin. Knowledge that a conspiracy exists is a prerequisite to finding wilful participation in that conspiracy. Here, in the light most favorable to the government, we have only an agreement to purchase which was never consummated and no evidence of knowledge that the conspiracy existed.

In light of the cases discussed above and the evidence here which, considered in the light most favorable to the government, shows only that appellant was offered narcotics and decided not to purchase them, appellant's conviction for conspiracy must be reversed and the charge dismissed.

POINT II

IN LIGHT OF THE TRANSFER OF AN INDICTMENT AGAINST APPELLANT FROM THE SOUTHERN DISTRICT OF FLORIDA BECAUSE THE GOVERNMENT WAS "COURT SHOPPING" AND THE DISMISSAL OF THAT INDICTMENT IN THE DISTRICT OF COLUMBIA ON SPEEDY TRIAL GROUNDS, THE GOVERNMENT'S INITIATION OF THIS PROSECUTION ONE DAY AFTER THE DISMISSAL SMACKS OF A RETALIATORY PROSECUTION AND IT WAS THEREFORE ERROR FOR THE DISTRICT COURT TO DENY APPELLANT A HEARING ON HIS CHARGE OF SELECTIVE PROSECUTION.

Equal protection standards, while not specifically applicable to the federal government through the Fourteenth Amendment are necessarily incorporated into the due process clause of the Fifth Amendment. "...[A]s this Court has recognized, discrimination may be so unjustifiable as to be violative of due process". Bolling v. Sharpe, 374 U.S. 497 (1954). See also, United States v. Falk, 479 F.2d 616 (7th Cir. 1973) and United States v. Steele, 461 F.2d 1148,1151 (9th Cir. 1972). While "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation...", Oyler v. Boyles, 368 U.S. 448,456 (1962), it is now recognized that if it can be shown there was "intentional or purposeful discrimination" then there is a denial of the equal protection of the laws.

Snowden v. Hughes, 321 U.S. 1,8 (1943).

But as this Court has noted:

> To support a defense of selective discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974).

In the present case a brief history of the government's efforts to prosecute appellant, partially noted in Circuit Judge Robb's opinion in United States v. Lara, 520 F.2d 460 (D.C.Cir. 1975), is enlightening:

> On October 26, 1972 a grand jury in the District of Columbia returned an indictment charging twelve defendants...with conspiracy to violate serious narcotic laws. The indictment alleged a conspiracy existent from about September 1, 1967 to about April 30, 1971...On January 31, 1973 the United States Attorney procured a superseding indictment, criminal no. 99-73, naming the twelve original defendants and one additional defendant,...Turner.

520 F.2d at 541.

The government, in two separate motions early in 1973, moved to dismiss both indictments. The district court granted both motions. The original was dismissed due to the superseding indictment. The superseding indictment was dismissed based on two reasons advanced by the government:

> (1) grave deterioration in the health of a key witness who would probably not be able to appear in Court at the time scheduled for trial and (2) the discovery by the government that another important witness was unavailable.

520 F.2d at 461.

On December 27, 1973, nine months later, the government procured a third indictment in the Southern District of Florida naming appellant Turner along with six defendants from the D.C. indictments and three others. This indictment alleged substantially the same offense. Before trial, Chief Judge Fulton of the Southern District of Florida transferred the case back to the District of Columbia, holding:

> That in seeking the indictment of these defendants in the Southern District of Florida the government was "court shopping". It became quite evident from the evidence that the agency in question brought this matter to the grand jury in Southern Florida, believing that government counsel and the court would be more favorable to the government's case than in the District of Columbia.

520 F.2d at 462.

District Judge Gesell, who dismissed the first two indictments, granted a motion to dismiss this indictment as to the defendants named in the D.C. and Florida indictments since the dismissal by him of indictment No. 99-73 "...was definitely with prejudice as to any possibility of the reinstitution of the case here..." Lara, 520 F.2d at 463. The Court of Appeals affirmed the dismissal. See Lara, supra.

Just one day after Judge Gesell's dismissal order of May 16, 1974 "Tennessee" Dawson, formerly Robinson's partner and now a major government witness against these defendants, appeared in front of another District of Columbia grand jury (see government's Exhibit 3518,(A-89)). The minutes of this appearance were turned over to the defense as 3500 material.

On July 28, 1975, Indictment No, 75 Cr.747 was filed in the Southern District of New York charging appellant Turner and fifteen others with twelve counts of conspiracy and substantive violations of federal narcotics laws. On October 6, 1975 an order of nolle prosequi was entered as to the indictment due to the procurement of superseding Indictment No. 75 Cr.788, filed August 5, 1975. The facts and circumstances which led to the filing of 75 Cr.747 were among the facts and circumstances which led to the filing of

75 Cr. 788. Appellant Turner was named in 75 Cr.788 also.

On November 18, 1975 the instant indictment, No. 75 Cr.1112, was filed and superseded 75 Cr. 788. This indictment charged Turner and sixteen others with conspiracy and substantive violations of federal narcotics laws during the same period as both superseded indictments, 1969 to 1973.

While a prosecutor has reasonable discretion as to whom to prosecute, United States v. Wiley, 503 F.2d 106 (8th Cir. 1974), and a prosecutor may decide randomly, United States v. Steele, supra at1152, or based on political prominence, United States v. Peskin, 527 F.2d 71 (7th Cir. 1975), or suspicion of involvement with organized crime, United States v. Sacco, 428 F.2d 264,271 (9th Cir. 1970); the prosecutor may not have an arbitrary and selective motive, United States v. Wilkinson, 389 F.Supp. 465 (W.D.Pa. 1975), aff'd 521 F.2d 1400 (3d Cir. 1975), or act in a discriminatory manner.

> It is the entire prosecution, and not an examination of its isolated parts which must command the attention of a court considering the defense of discriminatory prosecution.

United States v. Berrigan, 482 F.2d 171, 179 (3d Cir. 1973).

The timing of these events raises a serious question whether appellant's prosecution here was not motivated by the success of his motion to dismiss for deprivation of his right to a speedy trial in the D.C. Circuit. Clearly such a motivation would be impermissible, but despite his strong

prima facie showing, he has been denied a hearing to present his contentions.

It is clear that appellant has been singled out for prosecution, while others have either not been prosecuted at all or not proceeded against with the same abandon and passionate zeal, because he has been successful in exercising his legal and constitutional rights in his own defense. Appellant has seen at least six indictments and three different District Courts and yet the government still continues. It could hardly be coincidence that the government attempted to obtain a new indictment one day after Judge Gesell's dismissal of the Florida indictment. And it can hardly be coincidence that the government then took the case and at lease one witness north to the Southern District of New York where the present indictment was procured, a move that must bring to mind Chief Judge Fulton's original condemnation of Government "Court Shopping". 520 F.2d at 462.

The government's retaliatory purpose seems clear. They have pursued appellant with a zeal and passion that has become "bad faith" - appellant is being prosecuted now due to his prior success in exercising his legal and constitutional rights. There is a thin line between the single-minded determination of an able prosecutor and the obsession of a government bent on removing a certain individual or individuals from society. Such bad faith on the part of the prosecution

cannot be countenanced by our legal system and courts.

Appellant moved the District Court for a judgment of acquittal or a new trial based on, among other grounds, the theory of selective prosecution. (A- 73) The Court denied the motion without a hearing. Appellant contends that this was error as appellant had made an adequate preliminary showing of the prima facie requirements as set down by this court in Berrios, supra at 1211. The District Court should have held a hearing on appellant's claim. Appellant now asks this Court to reverse the judgment of conviction and remand the case to the District Court for a hearing on selective and discriminatory prosecution.

POINT III

APPELLANT TURNER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL.

The Sixth Amendment of the Constitution provides that:

> [i]n all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defense.

and the United States Supreme Court has held that the "right to counsel" is the right to the "effective assistance of competent counsel". McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

Appellant Turner was denied this right at trial. The first major government witness against appellant, "Tennessee" Dawson, testified at great length, often only reciting hearsay connecting Turner to the alleged conspiracy. Yet the cross-examination of Dawson by Turner's counsel was poorly executed, clearly ineffective, and inadequate as a defense. (A-24-48). This questioning led appellant to believe he was not receiving his constitutionally guaranteed right to the effective assistance of competent counsel. He contacted private counsel and asked counsel to take over his defense. Counsel felt it was inappropriate to enter the case

at that time, but would represent appellant if a severance and a continuance had been granted. (A-56) The court refused this request. Appellant then approached the court and requested permission to proceed pro se as his only alternative. The court took the matter under consideration and finally allowed appellant to proceed pro se. (A-59-72) As Judge Duffy noted when he permitted this, "there has been some kind of breakdown in relationship between the two of you" (A-71). But one of the government's major witnesses had already testified and the other, James March, was on the stand. And appellant's waiver of his right to be represented by counsel can hardly be deemed voluntary (A-67-72). He felt he had no other choice to make. This hardly amounts to voluntary waiver of the right by his own free will. See United States v. Calabro, 467 F.2d 973 (2d Cir. 1972), cert denied, 410 U.S. 926 (1973). Appellant, already in prison, conceived of further years being added to his incarceration due to the inadequacies of counsel and the court's ruling that he could not retain his own counsel in the situation as it then stood.

The damage to his right to counsel was done, if not totally at least such that an inexperienced pro se defendant could not rectify the ineffective cross-examination and the damage to his entire defense. To compel a defendant charged with a serious crime to undergo trial with the assistance of counsel with whom he has an irreconcilable

conflict is to deprive him of the effective assistance of any counsel whatsoever. See Brown v. Craven, 924 F.2d 1166 (9th Cir. 1970).

Appellant contends that the approach taken in this Circuit to claims of ineffective assistance of counsel is too harsh and ignores the reality of the situation. This right is a "defendant's most fundamental right for it affects his ability to assert any other right he may have." United States v. DeCoster, 487 F.2d 1197,1201 (D.C.Cir. 1973) (footnote omitted). The test followed in this Circuit is that the representation must be so totally inadequate as to shock the conscience of the court and make the proceedings a farce and a mockery of justice. United States v. Wright, 176 F.2d 376,379 (2d Cir. 1949), cert denied, 338 U.S.950 (1950) and United States v. Yanishefsky, 500 F.2d 1327,1333 (2d Cir. 1974). But, "if the right to counsel...is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel." McMann v. Richardson, supra at 771. And such a test does not offer adequate protection.

Other Circuits have established standards offering the necessary protection by recognizing that ineffective assistance occurs and is damaging before the point of "farce" and "mockery" is reached. Appellant respectfully requests that this Court now adopt such an approach.

The Fifth Circuit, in Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974), acknowledged this explicitly in holding that if the quality of counsel's service fell below a certain minimum level of competency then the defendant was denied the right to counsel. The Court stated that the test used in this Circuit is but one criterion, for counsel may be ineffective even though the proceedings were not a farce or mockery. The Seventh Circuit has also ruled that the focus in an inquiry concerning the effective assistance of counsel is on the minimal professional competence which the unwitting client is entitled to expect counsel to possess. United States ex rel Williams v. Twoney, 510 F.2d 634 (7th Cir. 1975).

In United States v. Hager, 505 F.2d 737 (8th Cir. 1974), the court cautioned that the standard of "mockery of justice" is not to be taken literally but to be employed as an embodiment of the principle that an appellant bears a heavy burden of proof in this case.

Another standard, similar to that employed by the Fifth and Seventh Circuits, is employed by the Sixth Circuit in defining the assistance of counsel required under the Sixth Amendment as counsel "reasonably likely to render and rendering reasonably effective assistance," not the "mockery of justice" test. Maglaya v. Buckhoe, 515 F.2d 265, (6th Cir. 1975).

Appellant contends that under any test he was denied the effective assistance of counsel inasmuch as his assigned counsel did not properly cross-examine the major government witness and, in the words of his counsel, counsel did not have "the confidence of the client and [was] at odd's point with him." (A-65) Counsel was unable to effectively cross-examine the witness and appellant was denied the right to retain his own counsel after expressing his dissatisfaction to the judge. The judge then allowed appellant to proceed pro se, his only alternative after the judge denied any other possible relief to appellant's precari us situation. Such actions denied him a fair trial, thus reaching the level of a "mockery of justice". Alternatively, if this Court, in the interests of justice, now adopts a test based on the level of competence of counsel, appellant maintains that the actions of counsel at trial did not measure up to an adequate level of professional competence.

POINT IV

APPELLANT WILLIAM TURNER PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE RESPECTFULLY ADOPTS ALL POINTS ADVANCED BY HIS CO-APPELLANTS INSOFAR AS THOSE POINTS ARE APPLICABLE TO HIM.

CONCLUSION

FOR ALL THE FOREGOING REASONS THE CONVICTION OF APPELLANT WILLIAM TURNER SHOULD BE REVERSED.

Respectfully submitted,

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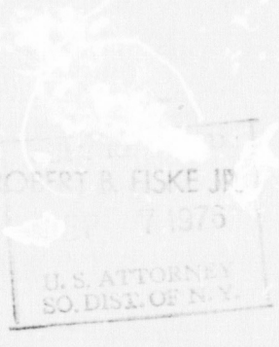
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